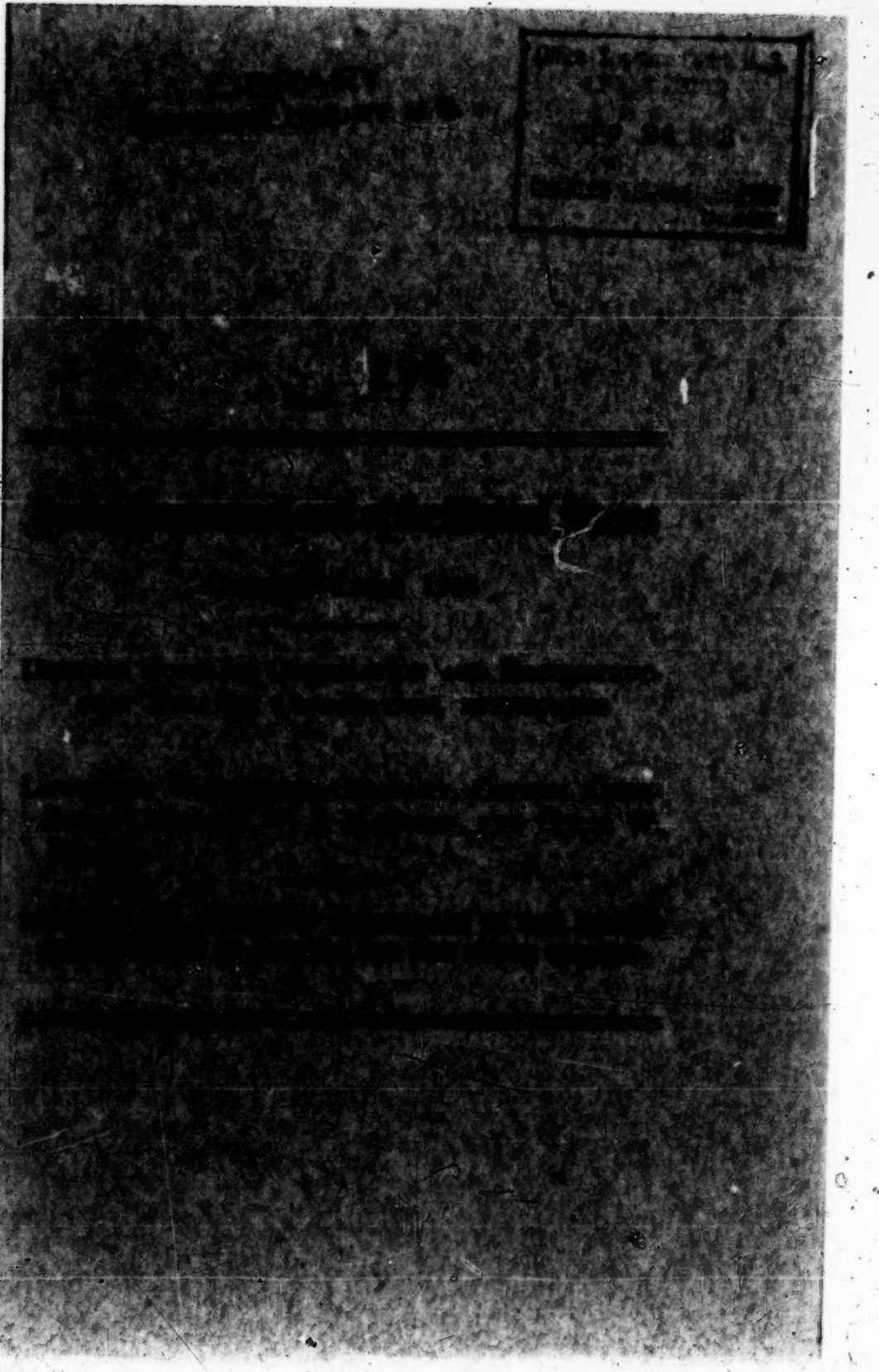

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. ——

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

v.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. MCGREW, AND CLYDE W. HENRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Defense Supplies Corporation and Reconstruction Finance Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 6, 1948.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit (R. 396–425) are reported at 168 F. 2d 199. Opinions of the Court of Appeals (R. 370–380) and of the United States District Court for the Northern District of California (R. 63–

75) previously handed down in this case but not concerned with the issues raised in this petition for certiorari are reported at 164 F. 2d 773 and 67 F. Supp. 16, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1948 (R. 426–427). A petition for rehearing, seasonably filed, was denied on May 13, 1948 (R. 428). On August 12, 1948, the time to petition for certiorari was extended to October 1, 1948, by the Chief Justice (R. 430). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code, enacted on June 25, 1948 (Public Law 773, 80th Congress, 2d sess.).

QUESTION PRESENTED

By the Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310), Congress provided for the dissolution, on July 1, 1945, of Defense Supplies Corporation and certain other government-owned corporations. It was provided, however, that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, a court, on proper showing, might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation. The question is whether, in the absence of the substitution of Reconstruc-

tion Finance Corporation within twelve months of Defense Supplies Corporation's dissolution, a court is required to dismiss, as abated, a suit which had been instituted by Defense Supplies Corporation and fully tried before its dissolution, and to vacate, as void, a judgment rendered during that twelve months in favor of Defense Supplies Corporation.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, reads as follows:

> That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19),

are hereby designated as the corporations to which this joint resolution applies.

SEC. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

SEC. 3. This joint resolution shall take effect on July 1, 1945.

STATEMENT

This suit, for damages for the destruction of certain quantities of tires and tubes which had been delivered for storage by DSC to respondents Lawrence Warehouse Company ("the Lawrence Company") and Capitol Chevrolet Company ("the Capitol Company"), was commenced on February 16, 1944, with the filing of a complaint in the United States District Court for the Northern District of California (R. 3–10). At the close of the trial by the court, sitting without a jury, on February 13–15, 1945 (R. 98–351),

respondents moved for dismissal, and, after argument, the case was ordered submitted to the court on memoranda and continued to May 1, 1945 (R. 60–63).[1] On January 9, 1946, the court handed down its opinion, directing that judgment enter in favor of DSC for damages in the amount of $41,975.15, against the Lawrence Company, the Capitol Company, and McGrew, but exonerating respondent Henry from any liability (R. 63–75). A formal judgment to that effect was entered on April 15, 1946 (R. 83–84).[2] The findings of fact, entered on the same day, were to the effect that the quantities of tires and tubes delivered by DSC to the Lawrence Company and the Capitol Company for storage had been destroyed by fire because of the concurrent negligence of those two companies and respondent McGrew (R. 77–82).

A motion for a new trial filed on April 12, 1946, having been denied (R. 85–90), appeals were then taken to the United States Court of Appeals for the Ninth Circuit by the Lawrence Company (R. 90), the Capitol Company (R. 94), and McGrew

[1] Oral and documentary evidence was presented only by DSC, respondents electing not to offer any proof (R. 310). Constantine Parella and Charles Elmore, whom the complaint named as defendants in addition to respondents (R. 3), were dismissed from the action at the close of the trial without objection (R. 307).

[2] On January 9, 1946, an order had been made that judgment enter in favor of DSC against all respondents except Henry (R. 76). On April 3, 1946, an order had been entered settling the findings of fact (R. 77).

(R. 96), from the judgment against them, and by DSC (R. 92), from the judgment in favor of respondent Henry. On December 5, 1947, after argument, the Court of Appeals affirmed the judgment of the District Court in its entirety (R. 370–380), and on January 2, 1948, it denied petitions for rehearing filed by the Lawrence Company and the Capitol Company (R. 381).

It was at that point that, on February 17, 1948, the Lawrence Company and the Capitol Company filed a motion in the Court of Appeals, for the first time calling attention to the Joint Resolution of June 30, 1945, and requesting that, in view of the dissolution of DSC, and the failure of RFC to be substituted for it before July 1, 1946, the Court of Appeals should vacate its decision affirming the judgment of the District Court, and, upon reconsideration, enter an order remanding the case to the District Court with instructions to dismiss the action (R. 386–389). Thereupon, on March 2, 1948, petitioners moved that the pleadings and the judgment be amended to correct the "defect of form," by substituting RFC as party-plaintiff in place of DSC (R. 392–393). On April 6, 1948, the Court of Appeals, Judge Healy dissenting, denied petitioners' motion and granted respondents' motion, thus refusing to substitute RFC for DSC, vacating its previous affirmation of the District Court's judgment, and remanding the case to the District Court for dismissal (R.

396–427). Petitions for rehearing thereafter filed were denied on May 13, 1948, and the opinion and dissenting opinion rendered by the court on April 6, 1948, amended pursuant to an order filed the same day (R. 428).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Ninth Circuit erred:

1. In holding that DSC, after its dissolution, on July 1, 1945, had neither the power to continue and prosecute suits theretofore instituted by or against it and then pending, nor such capacity as would permit courts to enter judgments in its favor in such actions.

2. In holding that upon that dissolution of DSC, all such pending suits abated and could be revived only if, within twelve months thereafter, RFC was substituted in place of DSC.

3. In holding that in the absence of a substitution of RFC, any courts in which such suits are pending lose all jurisdiction to determine them.

4. In holding that the failure to effect such a substitution is a defect in jurisdiction and not in form.

5. In holding that the decisions of this Court in *LeCroune* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board*, 258 U. S. 613; and *United States ex rel. Chapman* v. *Curran*, 276 U. S. 530, control the construction of the Joint Resolution of June 30, 1945.

6. In granting the motion of the Lawrence Company and the Capitol Company filed with the court on February 17, 1948.

7. In vacating and setting aside its prior judgment of December 5, 1947, and the District Court judgment of April 15, 1948.

8. In remanding the case to the District Court with instructions to enter an order dismissing the action.

9. In failing to hold that DSC, even after its dissolution, on July 1, 1945, continued in existence at least for twelve months thereafter for the purpose of continuing pending actions and with such capacity as would permit courts to enter judgments in its favor in such actions.

10. In failing to hold that the real party-plaintiff in interest in this case was and is the United States.

11. In failing to grant petitioners' motion for an amendment of the pleadings and the judgments to substitute RFC for DSC as the party-plaintiff.

REASONS FOR GRANTING THE WRIT

The decision below, as Judge Healy remarks in his dissent, achieves "an unconscionable result on the basis of insubstantial and purely technical considerations" (R. 417). Here, the majority of the Court of Appeals vacates a $41,000 judgment for damages for the negligent destruction of government property, which that very

court had previously affirmed, and dismisses a suit begun more than four years ago, which has been completely tried and fully argued in the trial court and on appeal, not because it has any doubt as to respondents' liability, but solely because the government corporation in whose name the suit was brought and judgment was entered has been dissolved and its functions transferred to its parent corporation. With that dissolution, says the majority of the court below, DSC ceased to exist, it no longer had the capacity to continue the then pending litigation or to have a judgment rendered in its favor, and, absent the substitution of RFC within twelve months thereafter, the action abated and must now be dismissed. This notwithstanding the specific provision in the joint resolution that no suit theretofore commenced by or against DSC should abate by reason of its enactment.

The decision below is admittedly (R. 411) in conflict with the recent decision of the United States Court of Appeals for the Eighth Circuit in *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011, and in our view, it is the decision below which is wrong. In any event, a definitive construction of the Joint Resolution of June 30, 1945, by this Court is needed if the public interest is not to be prejudiced and additional protracted litigation is to be avoided.

1. In *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011, suit was brought against Metals Reserve

Company, another of RFC's subsidiary corporations whose existence was terminated by the Joint Resolution of June 30, 1945, to recover damages for the alleged breach of certain sales contracts. Process was served on Metals Reserve Company on March 30, 1945, and an answer filed by it on April 4, 1945. The case was then continued to the June 1947 Term, and on Metals Reserve Company's motion at that time, the District Court dismissed the action as abated, no substitution of RFC having been effected within the twelve-month period provided by the joint resolution. On appeal, however, the Eighth Circuit Court of Appeals held that abatement was precluded by the very language of the resolution, the provisions with respect to the substitution of RFC establishing a condition precedent to plaintiff's right to protect his action against that successor corporation, but not to his right to pursue the case against the dissolved subsidiary corporation. Considering it significant "that the resolution contains the imperative command that by the dissolution of the corporation no suit 'shall abate,' while the provision with reference to substituting Reconstruction Finance Corporation * * * is clearly permissive, as indicated by the use of the word 'may'" (166 F. 2d at 1014), the court said:

> * * * the Metals Reserve Company, for the purpose of litigating plaintiff's claim, is still in being. That plaintiff

> failed to take proceedings for the substitution of the Reconstruction Finance Corporation can in no manner affect the liability of defendant Metals Reserve Company. It can have no concern with the question as to whether plaintiff has preserved his right to seek relief against the Reconstruction Finance Corporation. Certainly, the failure to make such a motion was no ground for dismissing the action as against the defendant Metals Reserve Company * * * (166 F. 2d at 1015).

The case was, therefore, remanded to the District Court.

Thus, in the *Gaynor* case, where there had been no trial of the facts at all, the United States was required to defend litigation instituted prior to June 30, 1945, against a government corporation whose dissolution was held not in the least to affect the vitality of the suit; whereas, on the other hand, in the present case, where there has been a full trial and judgment has been rendered and affirmed on appeal, the Government is prohibited from taking the benefits of that judgment solely because of the dissolution of the corporation in whose name the suit was initiated. The court below expressly noted that it was "not in accord" with the *Gaynor* decision. R. 111.

2. In our view, the Court of Appeals for the Eighth Circuit and not the court below correctly applies the joint resolution. Underlying the decision below are these assumptions: (1) that the

Joint Resolution of June 30, 1945, required the absolute dissolution of DSC; (2) that, consequently, after July 1, 1945, DSC was no longer in existence for any purpose whatever; and (3) that suits then pending by or against it could be revived only by the formal substitution, within twelve months thereafter, of RFC for DSC. Neither the history nor the letter of the joint resolution justifies so harsh a construction, and to adopt it would be to defeat the very purpose of the enactment.

The legislative history of the Joint Resolution of June 30, 1945, indicates, as the Eighth Circuit Court of Appeals remarks, "that it was the purpose of Congress to protect all vested rights by this positive declaration that the dissolution of the corporation should not disturb * * * vested rights not that any action lawfully commenced should be abated" (156 F. 2d at 1014). That Congress sought to achieve that end by prolonging the life of the subsidiary corporation

The provisions against abatement and for substitution of RFC were absent from the original draft of the resolution introduced by Senator Wagner and seem to have been added, while the resolution was in Senate Committee, in response to Senator Taft's suggestion that "there should be a specific statement that R. F. C. should become responsible for the liabilities and contracts" of the subsidiary corporations to be dissolved. Hearings before Committee on Banking and Currency, U. S. Senate, on S. J. Res. No. 65, 79th Cong., 1st sess., pp. 10, 11; see, also, S. Rep. No. 285; H. Rep. No. 816; and Hearings before Committee on Banking and Currency, H. of Rep. on S. J. Res. No. 65; all in 79th Cong., 1st sess.

at least for twelve months and for purposes of continuing pending litigation, seems clear from the fact that only six months later, in the same session, Congress, in passing the Act of December 6, 1945 (c. 557, 59 Stat. 597) for the financial control of "wholly owned Government corporations," defined that term as including, among other named agencies, "Defense Supplies Corporation" and the other corporations whose dissolution was decreed by the June resolution. Obviously, then, the very Congress which had provided for its dissolution in July considered that DSC was still in existence in December 1945, at least for some purposes, despite its prior dissolution.

The Joint Resolution of June 30, 1945, is similar in purport to a large body of similar statutes in the states, which "are designed to continue the life of the corporation for a definite or indefinite period after its dissolution, and either expressly or impliedly authorize suits and actions by and against it in its corporate name, during the time its existence is thus perpetuated." 16 Fletcher, Cyc. Corp., §8143; see Note, 47 A. L. R. 1397, *et seq.* Such statutes are remedial in character and should be afforded a liberal reading. *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. 2d 449, 450 (C. C. A. 2); *Eastman, Gardiner & Co.* v. *Warren*, 109 F. 2d 193 (C. C. A. 5). And the absence of an express provision for continuance of the cor-

poration is not significant; in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, notwithstanding the absence of such a provision in the Oklahoma statute, which, however, like the statute here involved contained a provision that pending actions should not abate, the Court held that "Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court." 273 U. S. at 260.

The joint resolution, then, when properly read, has the effect of prolonging the existence of DSC for the purposes of pending litigation. This by no means makes the twelve-month limitation in the statute meaningless, as the court below suggests (R. 401–402). The Eighth Circuit Court of Appeals construes that limitation as applicable only to the right which the resolution grants to litigants to hold the successor and still going corporation; RFC, responsible for DSC's debts (*Gaynor v. Metals Reserve Co.*, 166 F. 2d 1011, 1014), and that is by no means an unreasonable construction. But even if the twelve-month limitation was intended to affect rights of and against DSC, we submit that there is compelling logic for construing it liberally and only to preclude the continuance of litigation beyond the twelve-month period; during that period, by virtue of the joint resolution, DSC remained in existence for purposes of pending litigation. Since the judgment entered here in DSC's favor, in April 1946, was

well within the twelve-month period, it was a valid Judgment (see *National Bank* v. *Colby*, 21 Wall. 609, 615; *In re Aughenbaugh*, 38 F. Supp. 212, 213–214 (M. D. Pa.)), and the termination of the twelve-month period pending the appeal from that judgment did not impair the judgment's validity. See *Walling* v. *Reuter Co.*, 321 U. S. 671; *Yerxa, Andrews & Thurston, Inc.* v. *Viviano*, 44 S. W. 2d 98; *Steinhauer* v. *Colmar*, 11 Colo. App. 494; *Bank of Alexandria* v. *Patton*, 1 Rob. (Va.) 499, 525; 16 Fletcher, *Cyc. Corp.*, § 8154.

3. The decisions of this Court upon which the court below relies—*LeCrome* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590—do not support its ruling. They were concerned with statutes which, in material respects, were considerably different from the Joint Resolution of June 30, 1945.

United States ex rel. Claussen v. *Curran*, 276 U. S. 590, which the majority of the Court of Appeals cited as particularly conclusive of the instant case, was concerned with the Act of February 13, 1925 (c. 229, 43 Stat. 936, 941), which provided, in pertinent part, that pending cases against an officer of the United States who died or resigned might be permitted to be continued against his successor in office "if within six months after his death or separation * * *

it be satisfactorily shown to the court that there is a substantial need * * *" for doing so. The 1925 statute, however, lacked the clear declaration, present in the Joint Resolution of June 30, 1945, that pending litigation should not abate. And the survival of pending litigation was there specifically made conditional on timely substitution, whereas, in the 1945 resolution, no language appears importing such a condition to survival. In *LeCrone* v. *McAdoo*, 253 U. S. 217, and *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613, which dealt with the 1899 predecessor to the 1925 Act (Act of February 8, 1899, c. 121, 30 Stat. 822), a statute much more like the 1945 resolution in language, though the writs of error were dismissed, the judgments below were not disturbed; thus, the failure to effect an appropriate substitution was deemed only to have deprived this Court of authority to review the decisions of the lower courts, but not to have required the abrogation of those judgments and the dismissal of the actions, as in the *Claussen* case, where the 1925 statute was controlling.

Moreover, the *Claussen*, *LeCrone*, and *Payne* cases are none of them in point, because the 1899 and 1925 Acts, with which they were concerned, were radically different in genesis and design from the June 30, 1945 resolution. Those two Acts were general statutes intended to afford relief from the common-law rule that *personal* actions by or against public officers abated upon

their death or separation from office. See *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600; *Irwin* v. *Wright*, 258 U. S. 219. The *Claussen*, *LeCrone*, and *Payne* cases were all such personal suits. An action at common law involving a continuing duty of the public office, rather than the personal performance of the individual officer, did not, however, abate upon his separation from office. *Thompson* v. *United States*, 103 U. S. 480; *Marshall* v. *Dye*, 231 U. S. 250; *Bowden* v. *Johnson*, 107 U. S. 251, 264; *Murphy* v. *Utter*, 186 U. S. 95; *People ex rel. Chicotte* v. *Best*, 187 N. Y. 1; *Weadon* v. *Shahen*, 50 Cal. App. 2d 254. Thus, such actions presented no problem of abatement, no relief was needed in such cases, the 1899 and 1925 statutes were not intended to apply to them, and certainly they were not meant to abate them. Cf., *e.g.*, *Murphy* v. *Utter*, 186 U. S. 95 with *Ex parte La Prade*, 289 U. S. 444, 456–457. The instant suit clearly is one of this latter type of action; it was instituted in a representative capacity; it is in no sense a personal suit. See *United States* v. *Summerlin*, 310 U. S. 414, 416; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 249-250.[1] The construction which the courts have

[1] There can be little question that the United States is the real party in interest in this suit. As alleged in the complaint (R. 4) and found by the District Court (R. 78), the entire capital stock of DSC was owned by the United States, and the corporation was no more than "an agency, arm and instrumentality of the United States" engaged solely in carrying

afforded to the 1899 and 1925 Acts is, therefore, wholly irrelevant to the case in hand, particularly in light of the express provision in the Joint Resolution of June 30, 1945, against abatement. Cf. *Fleming* v. *Goodwin*, 165 F. 2d 334, 337–338 (C. C. A. 8), certiorari denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828.

4. Even were one to accept the basic assumption of the decision below, that the Joint Resolution of June 30, 1945, terminated the existence of DSC as of July 1, 1945, even for the limited purpose of continuing pending litigation, the judgment in favor of the Government, we submit, should not have been vacated, and the action should not have been dismissed. In such circumstances, well-established equitable principles require that the case be remanded to the District

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out governmental purposes. See, also, *Southern Pacific Co.* v. *Reconstruction Finance Corporation*, 161 F. 2d 56, 58 (C. C. A. 9); cf. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523–524; *Cherry Cotton Mills, Inc.* v. *United States*, 327 U. S. 536, 539; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 384. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, does not require that the reality of the Government's interest in suits instituted by or against its corporate agencies be disregarded. At the most, it stands for the proposition that where government corporations are concerned, a waiver of immunity to suit should be liberally construed (*F. H. A.* v. *Burr*, 309 U. S. 242, 245; cf. *United States* v. *Shaw*, 309 U. S. 495, 501; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523), thus differing from the rule of strict construction where the sovereign *eo nomine*, rather than one of its corporate instrumentalities, waives immunity (*United States* v. *Shaw*, *supra*, at 502–503; *United States* v. *U. S. Fidelity Co.*, 309 U. S. 506, 513, 514).

Court with directions that a judgment for DSC be entered *nunc pro tunc* as of a date prior to its dissolution. *Shakman* v. *United States Credit System Co.*, 92 Wisc. 366; *Florida Development Co.* v. *Polk County National Bank*, 76 Fla. 629; cf. *Mitchell* v. *Overman*, 103 U. S. 62; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648; *City of New Orleans* v. *Warner*, 176 U. S. 92; *Bell* v. *Bell*, 181 U. S. 175; Notes, 3 A. L. R. 1403, 68 A. L. R. 265. Resort to such a device to avoid the consequences of corporate dissolution is especially justified in furtherance or protection of the public interest. Cf. *Walling* v. *Reuter Co.*, 321 U. S. 671, 674–675. The inequities of a contrary course are apparent here; respondents, found at fault in the destruction of government property, are to be relieved of a judgment against them solely because, more than three years after the case was tried and after judgment had been rendered and affirmed on appeal, it called attention to a three-year-old statute dissolving the corporation.

5. A resolution by this Court of the conflict between the Eighth and Ninth Circuit Courts of Appeal is important to the United States. It is impossible to ascertain, with any accuracy, the number of cases which may be affected by the decision below. But there was a considerable body of litigation pending on July 1, 1945, by and against the corporations named in the Joint Resolution of June 30, 1945. It cannot be de-

ermined in how many such cases, then pending nd since presumed to have been closed, an ffort will now be made by the unsuccessful parties, on the basis of the decision below, to ave the judgments which may have been entered vacated and the actions dismissed as abated. See Rule 60 (b), Federal Rules of Civil Procedure, as amended.

CONCLUSION

For the foregoing reasons, it is respectfully ubmitted that this petition for a writ of ertiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1948.